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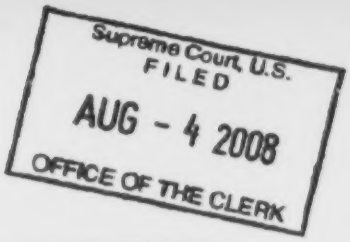

(3)

No. 07-1460

In the
Supreme Court of the United States

HONORABLE BOB RILEY, as Governor of the State of Alabama,
Appellant,

v.

FRED L. PLUMP,
Appellee.

On Appeal from the United States District Court for the Middle District of Alabama

BRIEF OF GOVERNOR BOB RILEY IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

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August 4, 2008

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BRIEF IN OPPOSITION

Governor Riley's Jurisdictional Statement sought to emphasize the similarities between the present case and the then-pending appeal in *Riley v. Kennedy*, Case No. 07-77. After the Jurisdictional Statement was filed, this Court issued its narrowly tailored decision, *Riley v. Kennedy*, 553 U.S. ___ (May 27, 2008), and the Alabama Supreme Court issued a decision of some import, *Working, et al. v. Jefferson County Election Commission*, ___ So. 2d ___ (Ala. June 30, 2008). *Working* triggered additional key events, which are discussed below. Still, § 5 itself, as well as substantial federalism concerns, compel resolution of this appeal in Governor Riley's favor.

1. The evolution of the facts since Governor Riley filed his Jurisdictional Statement demonstrates the burden Section 5 places on covered States, and by extension, on our Federal system of government. These facts spring from the Alabama Supreme Court's decision in *Working, et al. v. Jefferson County Election Commission*, ___ So. 2d ___, 2008 WL 2569255 (Ala. June 30, 2008), reprinted at Appendix 6a. The litigation presented a state court challenge to the Jefferson County local law at issue here, Act No. 77-784.

Litigants (including Governor Riley) challenged the state-law validity of a special election called by local officials pursuant to the Act No. 77-784. The trial court held that state law required a special election; the Alabama Supreme Court reversed, ruling that Governor Riley's appointment was valid,

and the special election invalid. *See* Appendix at 32a-41a.

Governor Riley had argued in state court that Act No. 77-784 violated § 105 of the Alabama Constitution. His argument was predicated on the authority of *Stokes v. Noonan*, 534 So. 2d 237 (Ala. 1988), one of the decisions at the heart of the *Riley* appeal and a decision on which the Governor relied in appointing Commissioner Bowman. Citing the principle that courts should avoid constitutional questions if the matter may be decided on other grounds,[1] the Alabama Supreme Court resolved *Working* on statutory grounds, holding that Act No. 2007-488 (reprinted at J.S. Appx. 51a) had repealed the Jefferson County local law. *See* Appendix at 32a-39a. The Court did *not* hold that Act No. 77-784 was constitutional, nor did it question its holding in *Stokes*; the Court simply affirmed Governor Riley's position on grounds different from those advanced by him.

The Alabama Supreme Court thus ruled that the Governor's appointment was proper, but for a different reason than was offered by the Governor and that was considered by the District Court in this case. Nonetheless, the difference in reasoning does not defeat the Governor's appeal for three reasons. First, the *Working* decision, issued in June 2008, does not change the fact that Governor Riley made the appointment at issue here in November 2007, some seven months earlier, because Alabama

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[1] *Cf. Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such [questions are] unavoidable").

Supreme Court precedent compelled the appointment.[2] The circumstances that gave rise to this litigation and appeal take the preclearance question here presented outside the normal confines of § 5 analysis within which the Plaintiff attempt to box it, *e.g.*, M.D.A. at 26-27.

Second, the Alabama Supreme Court's notation of § 105's "direct[ion that] the judicial branch . . . decide disputes under that provision" was made in the course of the Court's conclusion that the voter plaintiffs before it had standing. *See* Appendix at 20a-21a, n. 8. The Court was explaining that this provision undercuts any suggestion that its resolving the dispute would be contrary to the Separation of Powers concerns that animate the standing doctrine. *Id.* The Court was not, as Plump suggests, M.D.A. at 13, 29 n.12, rebuking the Governor for interpreting the law, as is required, in the performance of his function of implementing the law.

Third, the Alabama Supreme Court explicitly stated that it was not addressing the constitutional issue, preferring instead to resolve the litigation on statutory grounds. *See* Appendix at 32a. Given that, it is not for Plump to suggest that the Court

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[2] It is because Governor Riley made the appointment based on his understanding of Alabama Supreme Court precedent that USDOJ's letter requesting more information was misguided in, for example, requesting "[a] detailed description of the efforts . . . made . . . to secure the views of the public . . . regarding whether the voting change is retrogressive," *see* Letter from Christopher Coates, Acting Chief, Voting Section to Ala. Att'y Gen. Troy King and Ass't Att'y Gen. Misty S. Fairbanks (May 8, 2008), Appendix at 4a, and unreasonable in requesting various information on Jefferson County elections "in which an African-American candidate participated from 1997 to present," *id.*, Appendix at 3a.

implicitly rejected the constitutional challenge. *See* M.D.A. at 29 (emphasizing that the *Working* Court had referred to Act No. 77-784 as a "preexisting local law"). Nor are Pump's contentions about the impact of *Peddycoart v. City of Birmingham*, 354 So.2d 808 (Ala. 1978), M.D.A. at 28, n.11, on the constitutional analysis of any relevance. Governor Riley disagrees with Plaintiff's assessment of the import of *Peddycoart*, and he made his State law argument to the Alabama Supreme Court, which chose not to address the subject.

That said, the *Working* decision triggered several, additional new facts relevant to this appeal. The Alabama Supreme Court's statutory holding was based on enforcement of two new provisions of Act No. 2007-488, specifically new Ala. Code § 11-3-1(b) and (f). For good reason, those provisions had not been submitted for preclearance at the time that the *Working* Court ruled.[3]

USDOJ responded to news of the *Working* decision by declaring that a submission—filed months earlier as a result of the District Court's decision in this case—could not be reviewed until

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[3] Plump asserts that the State "has expressly refused" to submit provisions. *See* M.D.A. at 2; *see also id.* at 11-12, n.6. In fact, prior to the *Working* Court's decision, no change with respect to Ala. Code § 11-3-1(f) had been identified, and, in any event, it would have been premature to make any submission concerning the interaction between Ala. Code § 11-3-1(f) and Ala. Code § 11-3-1(b) before the latter subsection was independently ready for submission. The preclearance submission concerning other portions of Act No. 2007-488 made clear that Ala. Code § 11-3-1(b) was not appropriate for submission—at that time—because the Legislature was considering repealing the relevant change. Letter from Ala. Att'y Gen. Troy King to Chief, Voting Section (February 4, 2008) at 1-2.

Ala. Code § 11-3-1(b) was submitted. Letter from Christopher Coates, Acting Chief, Voting Section to Ala. Att'y Gen. Troy King (July 22, 2008); *see* Appendix at 42a. Ala. Code § 11-3-1(b), as well as Ala. Code § 11-3-1(f) and non-certification of the February 5, 2008 special election, have now been submitted. Letter from Ala. Att'y Gen. Troy King to Chief, Voting Section (July 28, 2008) (*Working* Supreme Court submission).

Additionally, the *Working* Court's enforcement of new Ala. Code § 11-3-1(b) means Commissioner Bowman's appointment is cut short, and an election is to be held this November to select someone to serve out the remainder of Larry Langford's term (that is, until November 2010). Appendix at 39a-40a. The Alabama Supreme Court remanded the case to the trial court "to enter an appropriate order declaring that the required election is to be placed on the November 2008 general election ballot." *Id.* at 40a. The normal qualification deadlines and party primaries had already passed. After a hearing, the trial court entered an order concerning the election details at 5:55 p.m. on Friday, July 25, 2008. On Monday, July 28, 2008, the State submitted the changes within the scope of § 5 embodied in that order for preclearance. Letter from Ala. Att'y Gen. Troy King to Chief, Voting Section (July 28, 2008) (*Working* trial court submission).

The next day, counsel for Plump filed a Complaint in federal court on behalf of Doris Powell. *Powell v. State of Alabama*. Case No. 2:08-cv-01345-LSC (N.D. Ala., pending). *See* Appendix at 46a. The Complaint seeks a declaratory judgment that preclearance of new Ala. Code § 11-3-1(b) and (f) and the non-certification of the February 5, 2008 special

election are required. *Id.* at 52a. (Powell knew the preclearance submission had made; she referred to it. *Id.* at 50a.) Powell also seeks an injunction preventing the defendants, absent preclearance, from failing to certify the special election results and from going forward with the November election of a new County Commissioner. *Id.* at 52a-53a.

In sum, the Governor's appointment, which he believed to be compelled by Alabama Supreme Court precedent, has been met with two § 5 challenges (*Plump* and *Powell*) and has resulted in three preclearance submissions—so far.

2. Governor Riley's appeal is timely. Plump argues that the District Court's order should be construed an interlocutory, requiring that any notice of appeal be filed within 30 days, not 60 days. *See* 28 U.S.C. § 2101. The order was not final, Plump argues, because the District Court did not address the single-judge claims raised under § 2 and the Thirteenth, Fourteenth, and Fifteenth Amendments and because the relief was uncertain. M.D.A. at 17-25. Plump further suggests that the stays entered by the District Court and this Court have somehow undermined any finality that the order would have otherwise achieved. M.D.A. at 23-25.

As to the unaddressed claims, Governor Riley pointed out to the District Court that it had not spoken to these claims, *see* J.S. Appx. 25a, and it did not respond. While never specifically invoking Rule 54(b) or its key language, the District Court encouraged a prompt appeal and consolidation with *Riley*. Specifically, in both the Judgment and the Amended Judgment, the District Court said: "The clerk of court is DIRECTED to enter this document on the civil docket as a final judgment pursuant to

Rule 58 of the Federal Rules of Civil Procedure so that appeal may be taken and the case consolidated with *Kennedy v. Riley*, O7-77, if the U.S. Supreme Court deems consolidation appropriate." *See* J.A. Appx. 13a, 17a.

Paradoxically, the District Court would have punished the Governor for an immediate appeal. The Amended Judgment provided that "the Jefferson County Commission seat currently occupied by General George F. Bowman shall be vacated on February 5, 2008 without further order of this court" if the Governor notified the court of an intent to "immediately appeal" or if the Governor failed to timely notify the court of his intentions. J.S. Appx. 17a. The only way to keep the Governor's appointment from being vacated in February was for the State to seek preclearance, *id.*, which it did.

As to the curious nature of the judgment, the contingent relief left nothing for the court to do—the hallmark of a final judgment. *See Catlin v. United States*, 324 U.S. 229, 233 (1945). Indeed, the District Court ensured that any of the various contingencies would operate automatically, without the court's further involvement.

As to the stays issued by this Court and the District Court, litigants often seek stays pending appeal, without thereby undercutting their ability to pursue the appeal.

Finally, while it was unclear in late January which—if any—remedy would materialize, it was clear that Governor Riley was "effectively out of court." *See Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 10 (1983). *Accord, Idlewild Liquor Corp. v. Epstein*, 370 U.S. 713, 715

n.2 (1962). Since then, Governor Riley has filed two notices of appeal – covering the entire range of dates on which the District Court's judgment might have become final. This Court's stay order is the only reason that the Governor's appointment has not been vacated. On balance, then, this Court should conclude that the District Court's order has achieved finality and that Governor Riley's appeal is timely.

3. Section 5 does not reach a return to a coverage-date practice.[4] The plain text of 42 U.S.C. §1973c requires preclearance of a practice or procedure that affects voting if it is different from the practice or procedure in place on the jurisdiction's coverage date. On November 1, 1964, Alabama's coverage date, vacancies on the Jefferson County Commission were filled by gubernatorial appointment. The Governor's appointment is a return to the coverage-date practice, and § 5's text therefore does not require preclearance.

Plump contends that gubernatorial appointment is *not* a return to the coverage date practice because of allegedly different rules for when the appointee's term ends. M.D.A. at 29-31. Under the 1964 practice, Plump argues, the Governor's appointee served for the entire unexpired term if the vacancy occurred within six months of the next general election. *See* Ala. Act 57-429.[5] Under the current

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[4] This argument is equally valid whether the return comes as a result of a legislative repeal or a court's declaration that a statute is unconstitutional. Whatever effect the Alabama Supreme Court's reasoning in *Working* may have on the Governor's remaining arguments, the coverage-date argument remains very much in play.

[5] Governor Riley does not concede that the 1957 statute is the proper "baseline." There was no evidence in the District Court

practice, the appointee serves for the entire unexpired term if the appointment occurs later than "30 days before the closing of party qualifying." Ala. Code § 11-3-1(b).

Two points are particularly relevant. First, the issue of *how* the vacancy is filled is a separate "standard, practice, or procedure" from *how long* the new Commissioner will serve. In both cases—in 1964 and today—vacancies are filled by appointment. That is the only practice at issue in this case. If, in 1964, the appointee would serve a shorter or longer term than under the 2008 practice, that is a separate practice meriting a separate § 5 consideration.

Second, and in the alternative, under both the 1957 local law and the practice sought to be enforced today, the Governor has the authority to appoint and his appointee would face election in November 2008. Even under Plump's argument that the practices can be combined, the State seeks to return to a coverage date practice, and that practice is not subject to the plain text of § 5.

4. The unchallenged back-to-back elections in Jefferson County in 1982 were a "temporary misapplication of state law," such that the practice of special elections was never "in force or effect." No citizen stepped forward to challenge the local law when it was implemented in 1982. The next vacancy did not occur until 2001, and it was filled by gubernatorial appointment.

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that Act No. 57-429 was ever once enforced. Even taking Plump's position as correct, though, the text of § 5 does not reach the return to gubernatorial appointment.

As this Court noted of the facts in *Riley*, "[i]f the only relevant factors were the length of time a practice was in use and the extent to which it was implemented, [*Riley*] would be a close case falling somewhere between the two poles established by our prior decisions." *Riley*, 553 U.S. at ___. At one pole lie *Perkins v. Matthews*, 400 U.S. 379 (1971), and *City of Lockhart v. United States*, 460 U.S. 125 (1983); in each of those cases, a practice that was unauthorized by state law was nonetheless "in force or effect" for purposes of § 5 because it was in effect on the *coverage date* designated by the statute. At the other pole lies *Young v. Fordice*, 520 U.S. 273 (1997); there, a voter registration practice was *not* "in force or effect," even though it was precleared and used before being abandoned as a "temporary misapplication of state law." This case likewise falls between the two poles, though, admittedly, it is a little further from *Young* than *Riley* was, given the absence of an early legal challenge and the length of time between its only use and its abandonment.

Ultimately, though, the *relevant* length of time is the period during which the practice of special elections was actually used, not how long it was on the books. Vacancies are infrequent. Here, there was none between the back-to-back use in 1982 and the non-use in 2001. This case is thus closer to *Young* (a temporary misapplication of State law) than *Perkins* and *Lockhart* (where the State was required to keep a coverage-date practice in place). Moreover, as noted in the Jurisdictional Statement, there is reason to believe that one of the 1982 special elections may have been held in violation of § 5, J.S. at 32, n.15; that election ought not be able to establish the § 5 baseline.

5. The District Court improperly skipped to the merits, thereby creating an additional basis for vacating and remanding the judgment below. Plump never addresses the Governor's argument that the District Court erred in skipping to the merits, when there was only a motion for preliminary injunction pending. This argument stands un-rebutted as grounds to vacate and remand for further consideration.

CONCLUSION

This Court should note jurisdiction, and either reverse the District Court or vacate and remand for further proceedings in light of the *Riley* decision, the evolving facts, and the District Court's improper jump to the merits. In the event the case is remanded, the Governor respectfully requests that this Court keep its stay in place pending any subsequent appeal and final decision by this Court.

Respectfully submitted,

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August 4, 2008

Appendix

U.S. Department of Justice

Civil Rights Division

Voting Section – NWB
950 Pennsylvania Avenue, NW
Washington, DC 20530

CC:TFM:DJ
DJ 166-012-2
2008-1576

May 8, 2008

The Honorable Troy King
Attorney General
Misty S. Fairbanks, Esq.
Assistant Attorney General
11 South Union Street
Montgomery, Alabama 36130

Dear Attorney General King and Ms. Fairbanks:

This refers to the change in the procedure for filling vacancies on the Jefferson County Commission from special election to gubernatorial appointment, for Jefferson County, Alabama, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. We received your submission on March 19, 2008.

Our analysis indicates that the information sent is insufficient to enable us to determine that the proposed change does not have the purpose and will not have the effect of denying or abridging the right

to vote on account of race, color, or membership in a language minority group, as required under Section 5. The following information is necessary so that we may complete our review of your submission:

1. The factual basis for the State or county's determination that the proposed change will not result in a retrogression of the effective exercise of the electoral franchise by the African-American voters of Jefferson County Commission District No. 1.

2. A special election was held for Jefferson County Commission, District 1 on February 5, 2008. Please provide any documents, including any analysis or reports that have been done discussing whether Mr. Bowman was the candidate of choice for African-American voters in that special election. For this election, please also provide the following:

(a) the number of votes each candidate received by precinct;

(b) the total number of persons who voted and the number of African-American persons who voted, by precinct, if that information is available;

(c) if a breakdown by race or ethnicity is not available as indicated in paragraph (b) above, copies of the actual voter sign-in sheets for each precinct located in whole or in part within Jefferson County for this election; and

(d) the number of registered voters, by race or ethnicity and precinct, at the time of the election.

3. Please provide any documents, including any analysis or reports that have been done discussing whether there is racially polarized voting in Jefferson County.

4. Please provide election returns by voting precinct for all state, county, municipal, and school district elections in which Jefferson County was included in whole or in part and in which an African-American candidate participated from 1997 to the present. For each election, please indicate the following:

(a) the office sought (indicate the incumbent(s), if any, their races, and whether incumbency was by election or appointment);

(b) each candidate's name and race or ethnicity;

(c) the number of votes each candidate received by precinct;

(d) the total number of persons who voted and the number of African-American persons who voted, by precinct, if that information is available;

(e) if a breakdown by race or ethnicity is not available as indicated in paragraph (d) above, copies of the actual voter sign-in sheets for each precinct located in whole or in part within Jefferson County for each election; and

(f) the number of registered voters, by race or ethnicity and precinct, at the time of the election.

(g) for early and absentee voting, if possible, an identification of the precinct in which early

and/or absentee voters would have voted on election day.

(h) if possible, this information should be provided in electronic format, either Excel or a delimited text file. If a delimited text file, please specify the common delimiter used.

5. The precinct boundaries used for the elections for which election return and voter registration data is requested. If possible, this should be in electronic form. It will expedite our review if we receive this information in "Shape file format," including all three types of files that form components of this format: .shp, .shx, and .dbf files.

6. A detailed description of the efforts, both formal and informal, made by the county or the State to secure the views of the public, including members of the minority community, regarding whether the voting change is retrogressive. Describe the substance of any comments or suggestions received, indicate the names and daytime telephone numbers of the persons making the comments or suggestions, and explain the State or county's response, if any.

The Attorney General has sixty days to consider a completed submission pursuant to Section 5. This sixty-day review period will begin when we receive the information specified above. See Procedures for the Administration of Section 5 of the Voting Rights Act (28 C.F.R. § 51.37). However, if no response is received within sixty days of this request, the Attorney General may object to the proposed change consistent with the burden of proof placed upon the submitting authority. See 28 C.F.R. §§ 51.40 and 51.52(a) and (c).

Changes which affect voting are legally unenforceable unless Section 5 preclearance has been obtained. *Clark* v. *Roemer*, 500 U.S. 646 (1991); 28 C.F.R. § 51.10. Therefore, to enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the State of Alabama plans to take concerning this matter. If you have any questions, you should call Donald Jacobsen (202-305-8299) of our staff. Refer to File No. 2008-1576 in any response to this letter so that your correspondence will be channeled properly.

Since the Section 5 status of this change is at issue in *Plump* v. *Riley* (Civ. Act. No. 07-1014, M.D. Ala. (three-judge court)) and *Working* v. *Jefferson County*, (No. 08-cv-900316, 10th Jud. Cir., Ala.), we are providing a copy of this letter to the court and counsel of record in those cases.

Sincerely,
/s/ Timothy Mellett
for
Christopher Coates
Acting Chief, Voting Section

REL: 06/30/08

[Notice concerning reporting typographical or other errors omitted.]

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2007-2008

1070850

Patricia Working et al.
v.
Jefferson County Election Commission et al.

1070893

Governor Bob Riley, in his official capacity
v.
Jefferson County Election Commission et al.

1070917

George F. Bowman
v.
State of Alabama ex rel. Fred L. Plump and William A. Bell, Sr.

Appeals from Jefferson County Circuit Court
(CV-08-900316)

PER CURIAM.

These appeals arise from challenges to the attempts to fill the district 1 seat on the Jefferson County Commission left vacant when Commissioner Larry Langford was elected mayor of the City of Birmingham in October 2007. The trial court held that the vacant seat was to be filled by a special election rather than by gubernatorial appointment. For the reasons stated herein, we reverse the trial court's judgment.

I. Facts, Procedural Background, and Applicable Statutes

On October 9, 2007, Larry Langford, the member of the Jefferson County Commission representing district 1, was elected mayor of the City of Birmingham. He thereafter resigned his seat on the Jefferson County Commission. On October 29, 2007, the Jefferson County Election Commission, pursuant to Act No. 784, Ala. Acts 1977,[1] adopted a resolution calling for a special election to fill the seat vacated by Langford. The resolution set the special election for February 5, 2008 -- the date of Alabama's presidential-preference primaries. Fred L. Plump, George F. Bowman, and William A. Bell, Sr., were among those who qualified to run for the district 1 seat on the county commission.

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[1] The Alabama Legislature enacted Act No. 784 effective May 25, 1977, as a local law that purported to authorize a special election to fill a vacancy on the Jefferson County Commission caused by "death, resignation, impeachment, or any cause except normal expiration of terms." § 1, Act No. 784.

On November 21, 2007, Governor Bob Riley appointed George F. Bowman to fill the vacant district 1 seat on the Jefferson County Commission. The Governor's appointment was made pursuant to a general law, § 11-3-1(b), Ala.Code 1975.[2]

---

[2] Section 11-3-1(b) now provides:

> "*Unless a local law authorizes a special election*, any vacancy on the county commission shall be filled by appointment by the Governor. If the appointment occurs at least 30 days before the closing of party qualifying as provided in Section 17-13-5, the person appointed to the vacated office shall only serve until seven days after the next general election following the appointment as provided herein. The person so appointed to fill the vacancy shall meet the residency requirements in subsection (a), and shall hold office from the date of appointment until the eighth day following the next general election. If the original term in which the vacancy occurred would not have expired on the eighth day following the next general election after the appointment, the person elected at the election required by operation of this subsection shall serve for a period of time equal to the remainder of the term in which the vacancy was created. Thereafter, election for the county commission seat shall be as otherwise provided by law."

The emphasized language, however, was first included in this statutory scheme effective in 2004. *See* Act No. 2004-455, Ala. Acts 2004. The substance of the first sentence, without the emphasized language, was part of the Alabama Code prior to the enactment of Act No. 784 in 1977. Until September 1, 2007, it was codified as § 11-3-6, Ala.Code 1975. Effective September 1, 2007, the entire provision, including the emphasized language and additional language, was renumbered by Act No. 2007-488 as § 11-3-1(b).

On January 31, 2008, Patricia Working and Rick Erdemir filed a complaint for declaratory relief in the Jefferson Circuit Court, naming as defendants the Jefferson County Election Commission and its individual members, namely Jefferson County Probate Judge Alan King, Jefferson County Sheriff Mike Hale, and Jefferson County Circuit Clerk Anne-Marie Adams. Among other things, they alleged that they were residents and taxpayers in Jefferson County and that the special election was unauthorized and unconstitutional because, they said, Act No. 784, Ala. Acts 1977, violated § 105 of the Alabama Constitution of 1901,[3] and that, even if Act No. 784 was not unconstitutional and authorized the special election, the date set by the Election Commission for the special election was incorrect. Accompanying the complaint were an application for a temporary restraining order and a motion for a preliminary injunction.

On February 1, 2008, the Jefferson Circuit Court conducted an expedited hearing in which it noted the absence of potentially interested parties

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[3] Section 105 provides:

> "No special, private, or local law, except a law fixing the time of holding courts, shall be enacted in any case which is provided for by a general law, or when the relief sought can be given by any court of this state; and the courts, and not the legislature, shall judge as to whether the matter of said law is provided for by a general law, and as to whether the relief sought can be given by any court; nor shall the legislature indirectly enact any such special, private, or local law by the partial repeal of a general law."

and issued an order holding that it would not have subject-matter jurisdiction until the attorney general was served with a copy of the complaint pursuant to Ala.Code 1975, § 6-6-227. It further stated that the matter would be held under submission until the plaintiffs had complied with § 6-6-227. Subsequent to the entry of that order, the attorney general was served with a copy of the complaint and filed an answer stating that he was entitled to be heard on the issue of the constitutionality of Act No. 784, and that because Act No. 784 is unconstitutional, the circuit court should enjoin the Election Commission from canvassing the votes and certifying the results of the special election. In addition, on February 6, 2008, Plump filed a motion to intervene as a defendant, which the court later granted.[4]

The special election was held on February 5, 2008. On February 12, Floyd McGinnis filed a "Joinder of Verified Complaint" and, with Working and Erdemir, amended the complaint to add Bell as a defendant. McGinnis, Working, and Erdemir (collectively referred to as "the Working plaintiffs") each filed a verification in support of the amended complaint.

On February 13, 2008, the Working plaintiffs filed a notice of appeal to this Court from the trial

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[4] Plump, a resident of district 1, is a plaintiff in a federal action challenging Governor Riley's appointment of Bowman to fill the district 1 vacancy on the Jefferson County Commission; that action is based on § 5 of the Voting Rights Act of 1963, 42 U.S.C. § 1973c (2000) and is presently pending review by the United States Supreme Court.

court's February 1, 2008, order and, specifically, its effective denial of a temporary restraining order and a preliminary injunction by holding the case "under submission." On February 14, 2008, this Court granted an emergency motion filed by the Working plaintiffs, enjoining the Election Commission from certifying the results of the special election until further order of this Court. On February 20, 2008, this Court issued an order noting that it appeared the statutory notice requirements pertaining to the attorney general had been met, remanding the cause to the trial court for a ruling on the merits of the Working plaintiffs' claims, and maintaining in place the injunction prohibiting the certification of the results of the February 5 special election pending further order of this Court. (Case no. 1070693.)

On February 21, 2008, the defendants moved to dismiss the action on the bases, among others, that the Working plaintiffs lacked standing to pursue their claims because, as was undisputed, Working and Erdemir did not actually reside in district 1 of Jefferson County and McGinnis had not suffered a sufficient, particularized injury. On February 27, 2008, Plump filed an answer to the complaint and a third-party complaint asserting a quo warranto action as a relator for the State against Bowman. *See* Ala.Code 1975, § 6-6-597.

On February 28, 2008, Governor Riley filed a motion, which was later granted, to intervene as a plaintiff. Also on February 28, the Working plaintiffs filed a second amended complaint, among other things, adding a claim that the Election Commission was required by Act No. 2007-488 to hold an election at the November 2008 general election to fill the

district 1 vacancy and that its refusal to do so was a violation of plaintiff McGinnis's right to vote in such an election.

On March 6, 2008, Bell filed, and on March 9, 2008, the trial court granted, a motion to join and to amend Plump's third-party quo warranto complaint against Bowman. The amended third-party complaint alleged that Bell was entitled to hold the office of County Commissioner for district 1 based on the result of the special election and that Bowman was unlawfully holding that office. Specifically, Bell and Plump alleged:

> "Governor Riley did not have the authority to appoint George Bowman to the District 1 seat because it is clear that a general state statute, Act 2007-488 codified at § 11-3-1(b), that begins 'Unless a local law authorizes a special election,' allows local laws on the same subject to coexist without violating § 105 of the Alabama Constitution. *Baldwin County v. Jenkins*, 494 So.2d 584 (Ala.1986)."

After conducting a hearing, the trial court issued a final judgment. In its judgment, the trial court held that the Working plaintiffs lacked standing to pursue their claims. As to the merits of the litigation, the trial court determined that the local law on which the special election was based, Act No. 784, Ala. Acts 1977, did not conflict with the general law, § 11-3-1(b), and therefore did not violate § 105 of the Alabama Constitution of 1901, because

of the proviso at the beginning of § 11-3-1(b) allowing local laws to authorize special elections to fill vacancies on county commissions. Finally, the trial court held that the Election Commission had set the special election for the correct day.

Consistent with the foregoing determinations, the trial court specifically ruled that Governor Riley's appointment of Bowman to the district 1 seat for the Jefferson County Commission was unauthorized and that, when the final results of the election of February 5, 2008, are certified by the Election Commission, the winner of the election will be entitled to hold the office of Jefferson County commissioner for district 1.

The Working plaintiffs, the Governor, and Bowman each appeal.

II. Subject-Matter Jurisdiction

We are presented with two issues pertaining to subject-matter jurisdiction. These include the standing of the Working plaintiffs to pursue their claims and the potential effect of § 17-16-44, Ala.Code 1975.

A. The Standing of the Working Plaintiffs

In the trial court, the Working plaintiffs asserted that they have standing to bring their claims in this case based on their status as residents and taxpayers of Jefferson County whose taxes go to

the general fund of the County.[5] They alleged that their status in this regard gives them standing to challenge the expenditure of moneys from the general fund for conducting an election not authorized by law.

In their February 21 motion to dismiss, the Election Commission and Sheriff Hale argued to the trial court that the Working plaintiffs did not have standing to pursue their claims because (1) Working and Erdemir were not residents or voters of district 1 and (2) McGinnis, although a district 1 voter, had "not stated or shown with particularity the injury in fact necessary to grant him standing to challenge the constitutionality of 1977 Ala. Act No. 784."[6] The motion to dismiss did not specifically address the Working plaintiffs' status as taxpayers of Jefferson

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[5] They also note that, as residents of Jefferson County, they will be governed by the winner of the election in his capacity as a member of the Jefferson County Commission. In addition, McGinnis notes his status as a voter in district 1 and, further, seeks the right to participate in the election of a county commissioner that, he asserts, should be scheduled for November 2008 in keeping with § 11-3-1(b), Ala.Code 1975.

[6] In their motion to dismiss, the Election Commission and Sheriff Hale also argued, and the trial court subsequently found, that because plaintiffs Working and Erdemir did not have standing, the court lacked subject-matter jurisdiction over the case as originally filed, and therefore the amendment by which McGinnis joined the action as a plaintiff "cannot relate back to the filing of the original complaint, because there is nothing 'back' to which to relate." Because of our disposition of the issue of the Working plaintiffs' standing as taxpayers, we need not address the issue whether McGinnis's joinder of the complaint related back to the date of the filing of the original complaint or, if it did not, whether the trial court nonetheless acquired subject-matter jurisdiction over McGinnis's claims as of the date they were filed.

County or whether that status contributed to their standing to obtain the relief they sought.

In proposed conclusions of law submitted to the trial court in preparation for the final hearing and in arguments presented at that hearing, the Working plaintiffs reasserted their position that their status, particularly as taxpayers, gave them standing to pursue their claims. As noted, however, in its final judgment, the trial court ruled against the Working plaintiffs on the issue of standing. Specifically, it held that because neither Working nor Erdemir were residents of district 1 they did not suffer a legal injury as a result of the special election. Among other things, it agreed with the Election Commission and Sheriff Hale that McGinnis lacked standing because he "had not stated or shown with particularity [an] injury in fact." The trial court did not directly address the issue of taxpayer standing.

On appeal, the Working plaintiffs again assert their status as residents and taxpayers of Jefferson County and again contend that that status gives them standing to pursue this case. In response, the Election Commission and Sheriff Hale urge this Court to uphold the trial court's ruling as to standing on the same grounds cited in the trial court's opinion; they make no substantive argument as to the issue of taxpayer standing.

We note at the outset of our analysis that the fact that neither the defendants nor the trial court has directly addressed the Working plaintiffs' argument as to the issue of taxpayer standing does not provide us with a reason to conclude, by default, that such standing exists. Standing is a component of

a court's subject-matter jurisdiction and, as such, is not subject to waiver. *See Waite v. Waite*, 959 So.2d 610, 613 (Ala.2006); *RLI Ins. Co. v. MLK Ave. Redev. Corp.*, 925 So.2d 914, 918 (Ala.2005). *See also United States v. Hays*, 515 U.S. 737, 742 (1995).

Whether a party has standing "turns on 'whether the party has been injured in fact and whether the injury is to *a legally protected right*' " so as " 'to ensure that he will *vigorously present his case*." ' *State v. Property at 2018 Rainbow Drive*, 740 So.2d 1025, 1027-28 (Ala.1999). This Court has said that a party has standing where, among other things, there is "an actual, concrete and particularized 'injury in fact' -- 'an invasion of a legally protected interest.' " *Alabama Alcoholic Beverage Control Bd. v. Henri-Duval Winery, LLC*, 890 So.2d 70, 74 (Ala.2003) (relied upon in *Town of Cedar Bluff v. Citizens Caring for Children*, 904 So.2d 1253 (Ala.2004)). We conclude that the Working plaintiffs had standing to bring their claims.

"In a long line of decisions this Court has recognized the right of a taxpayer to challenge, either as unconstitutional or as not conforming to statute, the expenditure of public funds by county officers." *Zeigler v. Baker*, 344 So.2d 761, 763 (Ala.1977) (quoted with approval in *Henson v. HealthSouth Med. Ctr.*, 891 So.2d 863, 866 (Ala.2004)). *See also Alabama State Florists Ass'n, Inc. v. Lee County Hosp. Bd.*, 479 So.2d 720, 722 (Ala.1985); *Court of County Revenues for Lawrence County v. Richardson*, 252 Ala. 403, 412, 41 So.2d 749, 754 (1949); *Reynolds v. Collier*, 204 Ala. 38, 39,

85 So. 465, 466 (1920). In *Broxton v. Siegelman*, 861 So.2d 376 (Ala.2003), this Court stated:

> "[T]he right of a taxpayer to sue ' " 'is based upon the taxpayer's equitable ownership of such funds and their liability to replenish the public treasury for the deficiency which would be caused by the misappropriation.' " ' *Hunt v. Windom*, 604 So.2d [395] at 396-97 [(Ala.1992)] (quoting *Zeigler v. Baker*, 344 So.2d 761, 763 (Ala.1977), quoting in turn, *Fergus v. Russel*, 270 Ill. 304, 314, 110 N.E. 130, 135 (1915))."

861 So.2d at 385 (emphasis omitted).

The standing of taxpayers to challenge the expenditure of public funds extends to funds expended for holding elections not authorized by law. In *City of Mobile v. Mobile Electric Co.*, 203 Ala. 574, 578, 84 So. 816, 819 (1919), the Supreme Court held that an election to adopt or reject a municipal ordinance would be improper and that "the complainant, as a taxpayer, had the right to enjoin the same." *See also Dennis v. Prather*, 212 Ala. 449, 103 So. 59 (1925) (citing *City of Mobile* with approval). We also take note of the result in *Petree v. McMurray*, 210 Ala. 639, 98 So. 782 (1923), a case in which an appointed county superintendent of education challenged an election that was to be held pursuant to a local law that he contended was in violation of Ala. Const.1901, § 175. The Court affirmed the trial court's order overruling a

demurrer[7] to the complaint, which contained the following allegations:

> "[N]otwithstanding the invalidity of said act, respondents, acting as an election commission, [were] threatening to and [were] about to advertise and call a special election, to appoint inspectors, clerks, etc., in the various voting precincts, and to purchase election supplies, all of which [was] without warrant of law, and it [was] alleged that the pay vouchers for the proposed election officers and the purchase of supplies [would] constitute illegal claims and expenses against the county, to the detriment of [the plaintiff] as a taxpayer; and that the holding of said election [would] tend to interfere with the proper discharge of the duties of his office."

210 Ala. at 640, 98 So. at 782.

Other jurisdictions also hold that a taxpayer has standing to challenge an election paid for with tax funds. For example, in *Bulgo v. Maui County*, 50 Haw. 51, 430 P.2d 321 (1967), a taxpayer challenged the holding of an election that was based on a newly

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[7] The common-law "demurrer" has been succeeded by a motion filed pursuant to Rule 12(b)(6) seeking dismissal of a complaint on the ground that it fails to state a claim upon which relief may be granted. *See Roberts v. Meeks*, 397 So.2d 111, 114 (Ala.1981).

enacted law providing for a special election to fill the term of a county chairman-elect who dies before assuming office. Describing the taxpayer's contention with regard to his standing to challenge the election, the Supreme Court of Hawaii wrote:

> "Plaintiff bases his standing to sue on the fact that he pays real property tax to the county of Maui, which tax goes into the county general fund out of which the expenses of the special elections are payable. He claims the requested relief on the ground that the challenged provision is a special law, violative of Article VII, Section 1, of the State constitution, and, unless restrained by the court, defendant will irreparably damage plaintiff by illegally expending funds raised by taxation in holding elections under an invalid statutory provision."

Bulgo, 50 Haw. at 54, 430 P.2d at 324. The Court held that this was sufficient to confer standing on the plaintiff to pursue his challenge of the election:

> "We hold that plaintiff has a standing to sue in this case. We base this holding on *Castle v. Secretary of the Territory*, 16 Haw. 769 [(1905)]. Although defendant urges that *Castle*, as a controlling authority on the point at issue, has been eroded by *Wilson v. Stainback*, 39 Haw. 67 [(1951)]; *Munoz v. Commissioner of Public*

> *Lands*, 40 Haw. 675 [(1951)]; *Air Terminal Services v. Matsuda*, 47 Haw. 499, 393 P.2d 60 [(1964)]; and *Helela v. State*, 49 Haw. 365, 418 P.2d 482 [(1966)], and should be overruled, we see no reason for doing so. Plaintiff has alleged sufficient personal interest in the controversy to entitle him to a day in court."

50 Haw. at 55, 430 P.2d at 324. *See also, e.g., Board of Supervisors of Elections of Anne Arundel County v. Smallwood*, 327 Md. 220, 233 n. 7, 608 A.2d 1222, 1228 n. 7 (1992) ("[I]ndividual taxpayers in each county also contested the proposed amendments' validity. Individual taxpayers have standing to sue for an injunction against submitting a proposal to the electorate; otherwise, they would be 'put to wrongful expense for the publication of the referendum and the printing of it on the ballots of the next general election.' "[8]

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[8] Our view of the standing issue in the present case finds further support in the fact that § 105 affirmatively directs the judicial branch to decide disputes under that provision: "[T]he courts, and not the legislature, shall judge as to whether the matter of said law is provided for by a general law, and as to whether the relief sought can be given by any court . . . ." The doctrine of standing is rooted in concerns that courts not exceed their proper scope of authority by intruding into matters more properly decided by another branch of government or by citizens as part of the political process. "The power of the judiciary . . . is 'the power to [decide] . . . a particular *case or controversy*.' " *City of Daphne v. City of Spanish Fort*, 853 So.2d 933, 942 (Ala.2003) (quoting *Ex parte Jenkins*, 723 So.2d 649, 656 (Ala.1998)) (emphasis added). In *Allen v. Wright*, 468 U.S. 737 (1984), the United States Supreme Court explained that

"the several doctrines that have grown up to elaborate" the "case or controversy" requirement, including that of standing,

> "are 'founded in concern about the proper -- and properly limited -- role of the courts in a democratic society' *Warth v. Seldin*, 422 U.S. 490, 498 . . . (1975).
>
> > " 'All of the doctrines that cluster about Article III -- not only standing but mootness, ripeness, political question, and the like -- relate in part, and in different though overlapping ways, to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judi-ciary in our kind of government.' *Vander Jagt v. O'Neill*, 226 U.S.App. D.C. 14, 26-27, 699 F.2d 1166, 1178-1179 (1983) (Bork, J., concurring)."

468 U.S. at 750. The Supreme Court further explained that the standing inquiry turns on whether "adjudication is 'consistent with a system of separated powers and [the dispute is one] traditionally thought to be capable of resolution through the judicial process,' *Flast v. Cohen*, 392 U.S. 83, 97 . . . (1968)." 468 U.S. at 752. The concerns expressed in *Flast v. Cohen* as to whether a court's resolution of a dispute would be "consistent with a system of separated powers" and whether "the dispute is one traditionally thought to be capable of resolution through the judicial process" are ameliorated in this case by the constitutional directive in § 105 for courts to decide disputes arising under that provision.

In the present case, it is clear that Jefferson County incurred costs in holding the special election for the district 1 county commission seat that it otherwise would not have incurred in administering the presidential-preference primary election on February 5, 2008. Section 17-16-4, Ala.Code 1975, provides that "[t]he State of Alabama shall reimburse a county for all sums expended by the county in payment of expenses incurred in holding and conducting an election in which only candidates for federal or state offices are nominated or federal or state officials are elected."[9] (Emphasis added.) Section 17-16-2 defines, but also limits, the "expenses" for which the State must reimburse counties:

> "As used in this chapter, the term 'expenses' shall include the following items, and no other:
>
> > "(1) The per diem and mileage provided by law for election officials.
> >
> > "(2) The per diem provided by law for the clerk or other official acting in his or her stead

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[9] At least in regard to the payment of election expenses, the legislature has indicated that a presidential-preference primary is to be treated as if it were an election in which "candidates for federal or state offices are nominated or federal or state offices are elected." *See* § 17-13-100(d) (providing that the State of Alabama's obligation to reimburse a county for sums expended in holding and conducting a presidential-preference primary shall be "as provided in Section 17-16-4").

for handling absentee ballots.

"(3) The costs of ballots, supplies, and other materials required by law to be furnished to election officials and certified by the judge of probate as chief election official of the county. In those counties where electronic voting machines are used, such voting equipment shall not be considered as ballots, supplies, or materials, as herein used.

"(4) The costs of absentee ballots, supplies, and other materials required by law to be furnished to the official handling absentee ballots.

"(5) The cost of preparing and furnishing the lists of qualified electors to the election officials as required by law."

Ala.Code 1975, § 17-16-2.

Even as to the specific "expenses" listed in § 17-16-2, however, § 17-16-4 does not obligate the State to reimburse a county for "all sums" expended by the county if the election is one in which candidates or officials for *other than* federal or state offices are to be nominated or elected. As to an election "in which candidates for both federal or state and county offices" are nominated or elected, § 17-16-3 governs. It provides that the State of Alabama is required to reimburse the county only "for one half of all sums expended by the county in payment of expenses incurred in holding and conducting" the election. Ala.Code 1975, § 17-16-3.[10]

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[10] Section 17-16-3 begins with the caveat "[e]xcept as provided in Section 17-8-12." Section 17-8-12, entitled "Compensation of election officials," provides:

> "(a) The inspector and clerks shall each be entitled to base compensation of fifty dollars ($50). *The compensation of the election officials shall be paid as preferred claims, out of moneys in the county treasury not appropriated, on proper proof of service rendered.* In all counties in which the compensation of election officials is prescribed by local law or general law of local application at an amount in excess of the amount prescribed, the compensation of the election officials shall not be decreased under this section and the county commission may increase the compensation so prescribed. In those counties in which compensation of election officials is set at an amount in excess of five dollars ($5) per day, but less than fifty dollars ($50) per day, the provision of the local law or general law of local application relative thereto is superseded and the compensation prescribed herein shall be the total

Finally, we note that, consistent with all of the above-discussed statutory provisions from Chapter 16, the parties stipulated as follows to the trial court:

> "46. Jefferson County's General Fund is used to pay persons to administer elections at the direction of the Jefferson County Election Commission, including the February

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compensation of election officials in the counties.

"(b) In addition to the compensation provided in subsection (a), *each clerk shall be entitled to supplemental compensation paid by the state* to ensure that the total compensation paid to each shall be in an amount of at least seventy-five dollars ($75) per day, and each inspector shall be entitled to *supplemental compensation paid by the state* in an amount that ensures that the total compensation of an inspector is at least one hundred dollars ($100) per day. Upon completion of a local election school or being certified as a qualified poll worker by the probate judge, or both, each clerk and inspector shall be entitled to receive an additional twenty-five dollars ($25) per day in compensation from the state. The increase provided for in this subsection shall not increase or decrease any salary supplement paid under a local law which is in effect on October 1, 2005. *The provisions of this subsection shall only apply to those statewide elections for which county expenses are reimbursed by the state as defined in Chapter 16.* The provisions of this subsection shall not apply to special county or other elections held at any time other than at the time of holding statewide elections."

(Emphasis added.)

> 5, 2008, presidential preference primary election. As a result of the Election Commission's resolving to conduct an election, monies appropriated from Jefferson County's General Fund pay for the printing of ballots used during the February 5, 2008, presidential preference primary election."

As previously noted, this Court has stated that standing "turns on 'whether the party has been injured in fact and whether the injury is to a *legally protected right*.' " *State v. Property at 2018 Rainbow Drive*, 740 So.2d at 1027. On the basis of the foregoing, we conclude that the Working plaintiffs had standing to bring their claims.

B. The Effect of § 17-16-44

Although the trial court did not address the issue, Plump argues on appeal that the trial court lacked subject-matter jurisdiction over all but his and Bell's third-party quo warranto action against Bowman on the basis of Ala.Code 1975, § 17-16-44. That statute provides:

> "No jurisdiction exists in or shall be exercised by any judge or court to entertain any proceeding for ascertaining the legality, conduct, or results of any election, except so far as authority to do so shall be specially and specifically enumerated and set down by statute; and any injunction, process, or order from any judge or

> court, whereby the results of any election are sought to be inquired into, questioned, or affected, or whereby any certificate of election is sought to be inquired into or questioned, save as may be specially and specifically enumerated and set down by statute, shall be null and void and shall not be enforced by any officer or obeyed by any person. If any judge or other officer hereafter undertakes to fine or in any wise deal with any person for disobeying any such prohibited injunction, process, or order, such attempt shall be null and void, and an appeal shall lie forthwith therefrom to the Supreme Court then sitting, or next to sit, without bond, and such proceedings shall be suspended by force of such appeal; and the notice to be given of such appeal shall be 14 days."

We disagree.

We begin by noting that § 17-16-40 prescribes grounds for an election contest that go to the manner in which the election was conducted and the eligibility of a candidate to hold the office at issue, and, in those respects, whether the particular outcome of the election was lawful or correct. Those grounds are as follows:

> "(1) Malconduct, fraud, or corruption on the part of any

> inspector, clerk, returning officer, canvassing board, or other person.
>
> "(2) When the person whose election to office is contested was not eligible thereto at the time of such election.
>
> "(3) On account of illegal votes.
>
> "(4) On account of the rejection of legal votes.
>
> "(5) Offers to bribe, bribery, intimidation, or other malconduct calculated to prevent a fair, free, and full exercise of the elective franchise.
>
> "(6) The results of a recount conducted under Section 17-16-20 name as a winner a person other than the person initially certified."

§ 17-16-40, Ala.Code 1975.

The present challenge to the February 5 election does not fall within the scope of an election-contest statute as suggested by the grounds of contest outlined in § 17-16-40. This conclusion comports with even more fundamental principles regarding the jurisdiction of our circuit courts as courts of general jurisdiction and of equity. In *King v. Campbell*, [Ms. 1060804, Nov. 30, 2007] ___ So.2d ___ (Ala.2007), this Court relied upon those fundamental principles to explain the jurisdiction of our circuit courts in relation to election challenges:

"Article VI, § 142(b), Ala. Const. 1901 (Off.Recomp.), provides:

> " '(b) The circuit court shall exercise general jurisdiction in all cases except as may otherwise be provided by law. The circuit court may be authorized by law to review decisions of state administrative agencies and decisions of inferior courts. It shall have authority to issue such writs as may be necessary or appropriate to effectuate its powers, and shall have such other powers as may be provided by law.'

". . . . The legislature has restricted the jurisdiction of the circuit courts by enacting § 17-16-44. . . . In *Dennis v. Prather*, 212 Ala. 449, 103 So. 59 (1925), this Court construed a predecessor statute to § 17-16-44. This Court noted:

> " 'The general rule without question is that courts of equity will not interfere by injunction with the holding of elections political in

> character, nor take jurisdiction of a contest after the election is held. *But this court is committed to the proposition that equity will interfere by injunction to restrain elections not authorized by law. It will also restrain the usurpation of office, or the assumption of functions of office where no lawful office exists.'*

"212 Ala. at 452, 103 So. at 61-62 (emphasis added). Speaking to the predecessor to *§ 17-16-44*, the *Dennis* Court stated:

> " ' *Statutes restricting the jurisdiction of courts of equity*, as defined at common law, and reiterated by statute in Alabama, *should be strictly construed*. Construing this statute as a whole, it appears, broadly speaking, to cover cases inquiring into the validity of elections theretofore held -- a proceeding in the nature of a contest of an election,

> whether the legality, conduct or results of the election be the point of attack. *We doubt if it would include a case of injunction against the exercise of any form of official power, derived through or by virtue of an election not authorized by law and therefore wholly void.* The equity jurisdiction in such case does not rest so much upon matters going to the conduct of the election, but upon the usurpation or abuse of official power under color of a void election.'
>
> "212 Ala. at 452-53, 103 So. at 62 (emphasis added)."

___ So.2d at ___ (some emphasis omitted). Thus, we concluded in *King*, "litigation challenging the consequences of a void election does not come within the sweep of the limitation on subject-matter jurisdiction in § 17-16-44." ___ So.2d at ___.

This principle controls in the present case. The Working plaintiffs, the Governor and Bowman make no challenge to the manner in which the February 5 special election was conducted or the particular results of that election; the challenge here is to the very holding of the election. It is a challenge to the

election as one "not authorized by law and therefore wholly void." The jurisdictional limitations imposed by § 17-16-44 therefore are not applicable.

III. The Validity of the February 5 Special Election

We turn now to the substantive question presented, the validity of the February 5 special election. Two issues are presented by the parties for our consideration: (1) whether Act No. 784, Ala. Acts 1977, upon which the election was based, is unconstitutional in light of the prohibition of certain local laws imposed by § 105 of the Alabama Constitution of 1901, and (2) whether Act No. 784 has been repealed by § 11-3-1(f). We first turn our attention to the latter issue because an affirmative response to it will make it unnecessary for us to address the constitutionality of a legislative enactment. *See generally, e.g., Lowe v. Fulford*, 442 So.2d 29, 33 (Ala.1983) (" 'Generally courts are reluctant to reach constitutional questions, and should not do so, if the merits of the case can be settled on non-constitutional grounds. *White v. U.S. Pipe & Foundry Co.*, 646 F.2d 203 (5th Cir.1981).' " (quoting trial court's order)); *Becton v. Rhone-Poulenc, Inc.*, 706 So.2d 1134, 1142 (Ala.1997) (explaining that "because we hold that [the federal statute] does not apply under the facts of this case, it is unnecessary for us to determine any constitutional issue concerning [that statute's] preemption of Alabama's applicable statute of limitations").

We begin our analysis with a brief examination of the decision of this Court in *Stokes v. Noonan*, 534 So.2d 237 (Ala.1988). At issue in *Stokes* was § 11-3-6, the precursor statute to § 11-3-1(b), the

general law at issue in the present case. At the time *Stokes* was decided, however, § 11-3-6 contained no exception for local laws. It stated simply as follows with respect to a vacancy in a county commission seat:

> "In case of a vacancy, it shall be filled by appointment by the governor, and the person so appointed shall hold office for the remainder of the term of the commissioner in whose place he is appointed."

This general law was in place when the legislature enacted Act No. 85-237, Ala. Acts 1985. Similar to the local law at issue here, Act No. 85-237 was a local law intended to provide for filling vacancies on a county commission of one particular county, specifically Mobile County, by a special election. Addressing the constitutionality of Act No. 85-237, the *Stokes* Court reasoned that

> "the legislature, by enacting a general law containing no . . . provision or exception for contrary local laws, thereby intended that general law to be primary and the subject subsumed entirely by the general law. In that situation, § 105 does operate to prohibit the enactment of contrary local laws."

Stokes, 534 So.2d at 239 (quoting *Baldwin County v. Jenkins*, 494 So.2d 584, 587 (Ala.1986)(emphasis omitted)). On this basis, the *Stokes* Court declared Act No. 85-237 to be unconstitutional.

Riley v. Kennedy, 928 So.2d 1013 (Ala.2005), dealt with the same local law as did *Stokes*, Act No. 85-237. By the time this Court decided *Riley*, however, the legislature had amended § 11-3-6 to add the beginning proviso "[u]nless a local law authorizes a special election." Act No. 2004-455. The plaintiffs in *Riley* argued that that made all the difference:

> "Kennedy argues that Act No. 2004-455, which amended § 11-3-6, Ala.Code 1975, manifests an intent by the legislature to cure the impediment to the enforceability this Court found as to Act No. 85-237 and to now give effect to that Act and that, consequently, a special election is the proper procedure by which to fill the vacancy created on the Mobile County Commission by Jones's resignation."

928 So.2d at 1016. The Court in *Riley* disagreed:

> "This Court has consistently held that
>
> > "'"statutes are to be prospective only, unless clearly indicated by the legislature. Retrospective legislation is not favored by the courts, and statutes will not be construed as retrospective unless the language used in the enactment of the statute

> is so clear that there is no other possible construction. *Sutherland Stat. Const.*, § 41.04 (4th ed 1984)." ' "

Riley, 928 So.2d at 1016. The Court continued:

> "Here, the plain language in Act No. 2004-455, amending § 11-3-6, Ala.Code 1975, provides for *prospective application only*, and that language must be given effect according to its terms. *Nothing in the language in Act No. 2004-455 demonstrates an intent by the legislature that the amendment of § 11-3-6 apply retroactively.* The argument that Act No. 2004-455 applies prospectively only is further supported by the preamble of the Act, which provides that the purpose of the Act is '[t]o amend Section 11-3-6 of the Code of Alabama 1975, relating to county commissions, to authorize the Legislature . . . *to provide* for the manner of filling vacancies in the office of the county commission.' (Emphasis added.) The language *'to authorize the Legislature . . . to provide'* the means by which vacancies on the county commission are to be filled further indicates an intention by the legislature that the Act is to be prospectively applied. Therefore, we hold that Act No. 2004-455 applies

> prospectively only; consequently, Governor Riley is authorized to fill the vacancy on the Mobile County Commission by appointment."

Riley, 928 So.2d at 1017 (most emphasis added; some emphasis omitted).

The Election Commission and Sheriff Hale argue that the issue in Riley was whether Act No. 2004-455 could "revive" a local act, Act No. 85-237, which previously had been declared unconstitutional in *Stokes*. Act No. 784, they point out, was at no time before the enactment of Act No. 2004-455 judicially declared to be unconstitutional. "It follows," according to the Election Commission and Sheriff Hale, "that Act No. 77-784 does *not* need to be revived. Therefore, the issue before this Court in *Riley v. Kennedy* is not present in this case and the *Riley v. Kennedy* decision is inapposite to this case."

The reasoning unanimously adopted by this Court in *Riley* does not admit of the distinction urged by the appellees. Again, as this Court stated, "the plain language in Act No. 2004-455 . . . provides for prospective application only"; "[n]othing in the language in Act No. 2004-455 demonstrates an intent by the legislature that the amendment [to the general law] apply retroactively," and "the preamble of the Act . . . provides that the purpose of the Act is '. . . *to authorize* the Legislature by local law *to provide*' " for exceptions to the general law. 928 So.2d at 1017.

Thus, in *Riley*, the introductory proviso in § 11-3-6 -- "[u]nless a local law authorizes a special

election" -- was interpreted to apply only to local laws enacted *after* Act No. 2004-455. Approximately two years after this Court's decision in *Riley* was issued, the legislature, in Act No. 2007-488, reenacted the same language -- including the aforesaid proviso -- which had been interpreted in *Riley*. It did so without choosing to make any changes to it (other than to renumber it as § 11-3-1(b)). The Working plaintiffs, the Governor, and Bowman argue that the meaning of this language was decided in *Riley* and that this Court has now but to apply that meaning in the present case. We agree. Other than the renumbering of the section in which this language appears, there has been no change in this language since the decision in *Riley*.

Our agreement with the appellants' position is buttressed by long-established and fundamental principles of statutory construction.

> "[T]here exists, and has long existed, in this state, a principle that when the legislature readopts a code section, or incorporates it into a subsequent Code, prior decisions of this court permeate the statute, and it is presumed that the legislature deliberately adopted the statute with knowledge of this court's interpretation thereof."

Edgehill Corp. v. Hutchens, 282 Ala. 492, 495-96, 213 So.2d 225, 227-28 (1968). *See also, e.g., Galloway Coal Co. v. Stanford*, 215 Ala. 79, 81, 109 So. 377, 379 (1926) (" 'It is a settled rule, that, in the adoption of the Code, the Legislature is presumed to have

known the fixed judicial construction pre-existing statutes had received, and the substantial re-enactment of such statutes is a legislative adoption of that construction.' *Morrison v. Stevenson*, 69 Ala. 448, [450 (1881)]."); 2B Norman J. Singer, *Sutherland Statutory Construction* § 49.09 (5th ed.1992) (compiling numerous Alabama cases to the same effect). As the Court aptly put it in the early case of *Barnewall v. Murrell*, 108 Ala. 366, 377, 18 So. 831, 836 (1895), it is "an elementary rule of statutory construction" that, where a reenacted statute has previously been construed by the courts, it is "presumed the legislature intended the adoption of that construction, or [it] would have varied the words, adapting them to a different intent." Here, the legislature could have "varied the words" of former § 11-3-6 in an effort to "adapt them to a different intent," but did not.

In accordance with the previous decision of this Court in *Riley v. Kennedy* and based on well-established principles of statutory construction, we conclude that § 11-3-1(b) requires vacancies on a county commission to be filled by gubernatorial appointment and that the proviso at the outset of that subsection (making an exception for local laws that authorize special elections) does not apply retroactively, that is to local laws that predate the legislature's adoption of that proviso. Act No. 784, Ala. Acts 1977, is such a local law.

In 2007, the legislature added subsection (f) to § 11-3-1. *See* Act No. 2007-488, Ala. Acts 2007. Section 11-3-1(f) now expressly repeals local laws in conflict with any other provision of § 11-3-1: "Any existing local law or portion thereof in conflict with

this section is specifically repealed to the extent of the conflict effective with the next election following September 1, 2007." Act No. 784, by purporting to provide for special elections to fill vacancies on the Jefferson County Commission, is "in conflict" with § 11-3-1(b), which requires vacancies to be filled by gubernatorial appointment, with no exception for preexisting local laws. Act No. 784, as a preexisting local law, therefore was repealed by the legislature's adoption of § 11-3-1(f). The trial court's validation of the February 5 special election on the basis that it was authorized by Act No. 784 is due to be reversed.[11]

IV. The Right to a November 2008 Election

McGinnis argues on appeal that he is entitled to an order requiring the Election Commission to include the county commission seat for district 1 on the November 2008 general election ballot. In support of this view, he cites us to the portion of § 11-3-1(b) that provides that "[i]f the appointment [by the Governor to fill a vacancy on a county commission] occurs at least 30 days before the closing of party qualifying as provided in Section 17-13-5," a condition that exists in this case, "the person appointed to the vacated office shall only serve until seven days after the next general election following

[11] The Working plaintiffs also contend that Act No. 784 violates their equal-protection rights and that, even if Act No. 784 governed, the Election Commission set the special election on the wrong day. As is true of the issue of the constitutionality of Act No. 784 in relation to § 105 of the Alabama constitution, our holding today makes it unnecessary for us to reach these additional issues.

the appointment . . . ." We also observe that the penultimate sentence of § 11-3-1(b) includes a reference to "the election required by operation of this subsection." Given our ruling today as to the repeal of Act No. 784, McGinnis's understanding of § 11-3-1(b) as it relates to the conduct of an election to fill the vacancy in the Jefferson County Commission is correct.[12] McGinnis seeks a judgment requiring that the election prescribed by § 11-3-1(b) be placed on the November 2008 general election ballot and "such additional orders as may be needed to secure full and appropriate relief consistent with the right of political parties to nominate candidates" for that election. The trial court is instructed to enter an appropriate order declaring that the required election is to be placed on the November 2008 general election ballot. As for the remainder of the relief requested by the appellants, this Court is confident that appropriate officials will take the necessary and appropriate steps as may be called for or allowed in any applicable provisions of Title 17, Ala.Code 1975, and any other applicable law, whether relating to the selection by political parties of nominees or any other aspect of the election process. Nothing herein shall prevent the parties from petitioning the trial court for such further relief as may be necessary and appropriate to fulfill the intent of this Court's judgment.

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[12] The opposition of the Election Commission to placing the county commission seat on the November ballot has been premised on its view that Act No. 784 supersedes the provisions of the general law in this regard.

V. Conclusion

For the reasons discussed, the judgment of the trial court upholding the validity of the February 5 special election on the basis of its conclusion that Act No. 784 authorized that election was in error. The Governor's appointment of George F. Bowman to fill the vacant district 1 seat on the Jefferson County Commission was in accordance with § 11-3-1(b) and was lawful. An election for that seat is to be held as part of the November 2008 general election. Accordingly, we reverse the trial court's judgment and remand the cause before us to the trial court for the entry of a judgment consistent with this opinion.

1070850-REVERSED AND REMANDED.

1070893-REVERSED AND REMANDED.

1070917-REVERSED AND REMANDED.

Cobb, C.J., and See, Lyons, Woodall, Stuart, Smith, Bolin, Parker, and Murdock, JJ., concur.

U.S. Department of Justice

Civil Rights Division

CC:TFM:DJ:jdh
DJ 166-012-2
2008-1576
2008-3861

Voting Section – NWB
950 Pennsylvania Avenue, NW
Washington, DC 20530

July 22, 2008

The Honorable Troy King
Attorney General
State of Alabama
Alabama State House
11 South Union Street
Montgomery, Alabama 36130

Dear Attorney General King:

This refers to the procedures for filling vacancies on the Jefferson County Commission, in Jefferson County, Alabama, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. We received your response to our May 8, 2008, request for additional information on May 27, 2008; supplemental information was received through July 1, 2008.

We understand that on June 30, 2008, the Supreme Court of Alabama issued its decision in *Working v. Jefferson County Election Commission*, ___ So.2d ___, 2008 WL 2569255, which held that the

county commission vacancy caused by the election of Larry Langford as Mayor of Birmingham would be filled initially by gubernatorial appointment, but that subsequently, the unexpired term would be filled by special election by the voters on the November general election date. 2008 WL 2569255, at *11-*12. It noted that this procedure was in accordance with Ala. Code § 11-3-1(b). *Id.*, at *11. According to our records, this change affecting voting effectuated by Ala. Code § 11-3-1(b) has not been submitted to the United States District Court for the District of Columbia for judicial review or to the Attorney General for administrative review as required by Section 5 of the Voting Rights Act. In fact, when the State submitted the underlying legislative act, Act No. 2007-488, which included Ala. Code § 11-3-1(b), for Section 5 review, it specifically excepted Ala. Code § 11-3-1(b) from the changes for which preclearance was being requested. Letter from Troy King, Attorney General, and Winfield Sinclair, Assistant Attorney General, to Chief, Voting Section, Feb. 4, 2008, at 1.

If our information is correct, it is necessary that these changes be brought before the District Court for the District of Columbia or submitted to the Attorney General for a determination that they do not have the purpose and will not have the effect of discriminating on account of race, color, or membership in a language minority group. Changes which affect voting are legally unenforceable unless Section 5 preclearance has been obtained. *Clark v. Roemer*, 500 U.S. 646 (1991); Procedures for the Administration of Section 5 of the Voting Rights Act (28 C.F.R. § 51.10).

Because the change now before us and the unsubmitted change are directly related, they must be reviewed simultaneously. Accordingly, it would be inappropriate for the Attorney General to make a preclearance determination on the instant change until the related change has been submitted for Section 5 review. See 28 C.F.R. §§ 51.22(b) and 51.35.

Should you elect to make a submission to the Attorney General for administrative review rather than seek a declaratory judgment from the District Court for the District of Columbia, it should be made in accordance with Subparts B and C of the procedural guidelines. At that time, we will review all changes simultaneously; however, any documentation previously provided need not be resubmitted.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the State of Alabama plans to take concerning these matters. If you have any questions, you should call Donald Jacobsen (202-305-8299) of our staff. Refer to File Nos. 2008-1576 and 2008-3861 in any response to this letter so that your correspondence will be channeled properly.

Since the Section 5 status of these changes is before the court in *Plump v. Riley*, No. 2:07-cv-01014-MEF-CSC (M.D. Ala.), we are proving a copy of this letter to the court and counsel of record in that case.

Sincerely,
/s/ Timothy Mellett
for
Christopher Coates
Chief, Voting Section

cc: Court and Counsel of Record

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

DORIS POWELL, Plaintiff, v. THE STATE OF ALABAMA; JEFFERSON COUNTY ELECTION COMMISSION; ALAN KING, MIKE HALE, and ANNE-MARIE ADAMS, in their official capacities as members of the Jefferson County Election Commission, Defendants.	CIVIL ACTION NO.

COMPLAINT

1. This is an action to enjoin violations of Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c. This action is necessary because the defendants are proceeding to enforce changes in election practices which have not been precleared under § 5 of the Voting Rights Act, 42 U.S.C. § 1973c, by either the Attorney General of the United States or the U.S. District Court for the District of Columbia.

Parties

2. Doris Powell is an African-American citizen of Alabama and a registered voter in Commission District 1 of Jefferson County.

3. Defendant State of Alabama is a state that, along with its political subdivisions, is a jurisdiction covered under § 4 of the Voting Rights Act, 42 U.S.C. § 1973b, and thus may not enact or seek to administer any change in voting practice or procedure unless and until it receives preclearance under § 5 of the Voting Rights Act, 42 U.S.C. § 1973c. Congress has abrogated the Eleventh Amendment immunity of the State of Alabama with respect to plaintiff's claims in this action.

4. Defendant Jefferson County Election Commission is by statute responsible for appointing election officials and for canvassing and declaring the results of elections for county offices. Alan King, Probate Judge No. 1 for Jefferson County, Mike Hale, Sheriff of Jefferson County, and Anne-Marie Adams, Jefferson County Circuit Clerk, are the members of the Jefferson County Election Commission by virtue of the offices they hold. They are sued in their official capacities.

Facts

5. The Alabama Legislature adopted Act 784 in the 1977 Regular Session (hereafter "Act 1977-784"), providing that when a vacancy occurs on the Jefferson County Commission, the Election Commission of Jefferson County shall call a special election. A copy of Act 1977-784 is attached as Exhibit A to this complaint.

6. Act 1977-784 has been precleared under § 5 of the Voting Rights Act by the Attorney General of the United States.

7. Act 1977-784 was used to call elections in 1982 to fill two vacancies on the Jefferson County Commission.

8. Jefferson County Commissioner Larry Langford has been elected Mayor of the City of Birmingham. He took office on Tuesday, 13 November 2007. He resigned his seat in District 1 of the Jefferson County Commission, which has a majority-black electorate.

9. The Election Commission called a special election on the first Tuesday in February to fill the vacancy

10. Pursuant to Act 77-784, six candidates properly qualified to have their names placed on the ballot for the February 5, 2008, Special Election. Those candidates were George F. Bowman, William A. Bell, Fred Plump, Orville Ifill, Kamu Afrika and Eric Major.

11. The date of the February 5, 2008, Special Election was submitted to the United States Department of Justice for pre-clearance on November 27, 2007. The United States Department of Justice issued a "no objection" letter to the February 5, 2008, Special Election on January 17, 2008.

12. William A. Bell received slightly more than 56% of the votes cast in the February 5, 2008, Special Election.

13. As required by § 17-12-15, Alabama Code (1975), the Jefferson County Election Commission

was scheduled to meet at 12:00 noon on Friday, February 15, 2008, to certify William A. Bell as the winner of the February 5, 2008, Special Election, to fill the vacancy in Commission District 1 on the Jefferson County Commission.

14. On Thursday, February 14, 2008, the Supreme Court of Alabama enjoined the Jefferson County Election Commission from certifying William A. Bell as the winner of the February 5, 2008, Special Election, pending further orders of the Supreme Court of Alabama.

15. The defendants have complied with the February 14, 2008, injunction of the Supreme Court of Alabama, even though their compliance constitutes a change in voting practice which may not be implemented unless it receives preclearance under § 5 of the Voting Rights Act, and even though said change in voting practice has never been submitted for preclearance.

16. On June 30, 2008, the Supreme Court of Alabama held that "Act No. [1977-]784, as a preexisting local law, . . . was repealed by the legislature's adoption of [Ala. Code] § 11-3-1(f)" in Act 2007-488. Working v. Jefferson County Election Comm'n, __ So.2d __, 2008 WL 2569255 (Ala., June 30, 2008) at *11.

17. The Supreme Court of Alabama further held that § 11-3-1(b), Code of Alabama, which was also amended by Act 2007-488, requires the vacancy on the Jefferson County Commission to be filled, first by gubernatorial appointment, then by a special election during the November 2008 general election, and it instructed the Circuit Court to order that a special election to fill the vacancy on the Jefferson

County Commission be placed on the November 4, 2008, election ballot. Id.

18. On July 25, 2008, the Jefferson County Circuit Court entered an order enjoining the certification of the February special election results, calling a November election for the County Commission District One seat, and setting deadlines for party nominations and independents petitioning for a ballot slot.

19. On July 26, Fred Plump (a party in the *Working* case) filed a motion to amend the Order of July 25 to condition the November election on the preclearance of the failure to certify the February special election and § 11-3-1(b) and (f). The Circuit Court denied that motion on July 28.

20. On July 28, 2008, the State of Alabama made two submissions for preclearance under § 5 of the Voting Rights Act: one letter states, "Specifically, this submission concerns Act No. 2007-488 as it relates to new Ala. Code §§ 11-3-1(b) & (f)" and "Accordingly, the noncertification of the February 5 election is a new practice resulting from the enforcement of new Ala. Code § 11-3-1 (f)." Nevertheless, the State's submission states that "§ 11-3-1(b) is being implemented in Jefferson County now. . . ."

21. The second submission letter stated, "On remand, the trial court has entered an Order to facilitate voting on the County Commission seat this November. **That order is the subject of this preclearance submission.**" (Emphasis in original.)

22. Neither request for preclearance has been granted.

23. Unless and until §§ 11-3-1(b) and 11-3-1(f) have been precleared under § 5 of the Voting Rights Act, Act 1977-784, the last precleared statute prescribing the manner of filling vacancies on the Jefferson County Commission, remains in full force and effect.

24. However, in its submission to the Department of Justice the State has taken the position that, should preclearance be denied, Act 1977-784 cannot be enforced because of the stay issued by the U.S. Supreme Court in Governor Riley's appeal from the judgment in *Plump v. Riley*, __ F.Supp.2d __, 2008 WL 192826 (M.D. Ala., Jan. 22, 2008). The State's position ignores this explicit disclaimer by the Middle District Court in *Plump*: "The court emphasizes that whether Act No. 77-784 is, in fact, unconstitutional under state law, and whether positions on the Jefferson County Commission must be filled by special election or gubernatorial appointment under state law, are questions we do not reach and this opinion should not be understood in any way as reaching." Id. at *3. Thus the issues presented in this action are not pending before the U.S. Supreme Court.

25. However, the U.S. Supreme Court is in recess and cannot be expected to act on Governor Riley's appeal in *Plump* before the first Monday in October. That will be too late to prevent the names of candidates for the District 1 seat on the Jefferson County Commission from being printed on the November 4 general election ballot. That ballot must be certified by September 15, 2008. Consequently, only action by this Court can prevent implementation of the statutory repeal of Act 1977-

784 in the event that preclearance of that repeal is not obtained before September 15.

Claims

26. Defendants are violating § 5 of the Voting Rights Act, 42 U.S.C. § 1973c, by administering, without preclearance, a practice different from that in effect in 1977. The plaintiff will be harmed by the failure to preclear the changes in election practices before the November 2008 election, in that implementation of said changes may lead to retrogression of her voting strength as an African American.

Prayer for Relief

A. The plaintiff prays that the Court promptly will convene a three-judge court to hear and decide this matter.

B. The plaintiff prays that the Court will enter a declaratory judgment that until and unless they have received preclearance under § 5 of the Voting Rights Act:

(1) the defendants lack the power to comply with orders of the state courts implementing §§ 11-3-1(b) and 11-3-1(f), Code of Alabama, as amended by Act 2007-488, by placing a special election for District 1 of the Jefferson County Commission on the November 4, 2008, general election ballot, and

(2) the defendants lack the power to comply with the February 14, 2008, injunction of the Supreme Court of Alabama by refusing to certify the results of the February 5, 2008, special election.

C. The plaintiff prays that the Court will grant preliminary and permanent injunctions prohibiting defendants from:

(1) complying with orders of the state courts implementing §§ 11-3-1(b) and 11-3-1(f), Code of Alabama, as amended by Act 2007-488, by placing a special election for District 1 of the Jefferson County Commission on the November 4, 2008, general election ballot, and

(2) complying with the February 14, 2008, injunction of the Supreme Court of Alabama by failing or refusing to certify the results of the February 5, 2008.

D. The plaintiff further prays that the Court will stay entry of the injunctions sought in the preceding paragraph until September 14, 2008, the day before the probate judge's deadline for sending the ballot to the printers for the November 4, 2008, general election, to provide defendants or other appropriate officials of Jefferson County and/or the State of Alabama an opportunity to submit and to obtain preclearance under § 5 of the Voting Rights Act, of §§ 11-3-1(b) and 11-3-1(f), Code of Alabama, as amended by Act 2007-488, and defendants' refusal or failure to certify the results of the February 5, 2008, special election.

E. The plaintiff prays that the Court will order the defendants to pay their reasonable attorneys' fees, costs, and expenses.

F. The plaintiff prays for such other and additional relief as the Court may deem just and equitable.

Submitted by,

/s/ Edward Still

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